No. 2896

United States

Circuit Court of Appeals

For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

W. J. REID,

Appellee.

Brief for Appellee

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

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Appellant's assignments of errors are nine in number, several of which are similar in substance and effect. How many of them are urged it is difficult to say; but from its counsel's assembling of the propositions now before the court (Brief of Appellant, page 18), they appear to be whether the appellee received in the accident injuries not disclosed in the settlement, or known to them; whether appellee is by his conduct estopped from claiming the right to recover for such newly discovered injuries, and did the release executed in the manner and terms appearing constitute a bar to any action for injuries received in that accident. These, appellant says, are the three questions for determination.

We think that the real question before this court is whether there was such a mistake in the settlement, as evidenced by that release, that a court of equity will afford relief to a party against whose claim it is interposed. The circuit court found and held that such a mistake inhered in the transaction. It found and decided against appellee's contention that it should be annulled for fraud and based the decision and decree solely on the ground that a mutual mistake of fact had been made, so that, therefore, while no fraud was established as to the procuring of the release, it would under the facts and circumstances amount to the perpetration of a fraud on appellee if the appellant were to be allowed to interpose it in bar of the action at law.

Counsel for appellant begin with the assertion that no injury was sustained by the appellee in that accident, which was not known to him and not in contemplation of the persons having a hand in making the settlement. This is the head-liner for subdivision I of appellant's argument. This question, we think, was not and could not be finally determined in the action to avoid the release or limit its operation. The remarks of Judge Rudkin as to the cause or origin of the physical ailments of which the appellee complained were not meant to dispose of that issue, for the court said that, regardless of any such uncertainty, if appellee has sustained injuries not embraced in the compromise set forth in the complaint, he should have his day in court and an opportunity to

establish his rights before a jury.

For the purposes of the case at bar all the appellee was required to establish in that regard was an uncertainty. He made out a prima facie case, when he proved facts sufficient to present a jury question as to the determination whether his conceded existing condition was caused by the accident.

Appellee had no hernia on the left side before the accident. He did not feel any trouble there during the negotiations with the claim agents, and it was the next day that he became aware of something, he didn't know what it was, down there where it hurt. (Tr. 29). He complained to the company of the double hernia in June, the month following that in which the accident occurred.

Stripped of all its engaging exposition of esoteric learning, expressed in the nomenclature of materia medica and anatomy, the testimony of Dr. Marshall, appellant's expert, leaves the matter finally punctuated with a prominent interrogation point. The examination of Dr. Marshall concluded:

> "Q. And you cannot tell what the cause of the hernia?
>
> A. I know what the predisposing cause is.
>
> Q. But you cannot tell whether or not it is caused by a severe strain or by lifting or pushing, can you?
>
> A. No, in an individual case I cannot tell what the precipitating cause was.
>
> Q. And isn't it possible, say a man was thrown violently across a car so he could bruise

and strain himself, wouldn't that cause this hernia to happen?

A. If thrown violently?
Q. If thrown violently.
A. If thrown violently." (Tr. 67.)

From the testimony of Reid, the appellee here, it cannot be gathered that he was gently wafted across the cook car to comfortable repose against the sink, and we think that the evidence of violence was sufficient for its consideration in the case at bar. (Tr. 27.) So here we have it concededly established that the appellee is afflicted and suffering from a double hernia, where before he had but a single one. It matters not that the hernia on his right side which he had before the accident was what Dr. Marshall characterized as the "predisposing" cause of that on the left, if the accident was the precipitating cause. In any event, the ultimate fact must be submitted to and determined by a jury, and not by the *ipse dixit* of a doctor in this sort of a case where the injury figures only incidentally.

The answer to the first inquiry of the appellant on page 18 of its brief must be answered in the affirmative. We do not think that the fact of the injury needs to be established by the degree of proof indicated. That the hernia on the left side was not disclosed is absolutely certain. No such thing was ever discussed or mentioned. It was neither known to the appellant nor the appellee. Nothing was considered in the settlement outside of the swelled ankle.

Dr. Longeway, the appellant's resident physician, does not pretend that he was treating or considering any injury other than that to the foot, except for his claimed insistence on examining Reid's shoulder. He says:

> "I asked the man to stay around two or three days where I could take care of and look after him. * * * I told him I thought he would be all right. That was my opinion that he would be all right very shortly, although I thought he better stay around there perhaps two or three days to *see if his ankle swelled up any more.*" (Tr. 47.)

The claim agent, Burton, testified:

> " * * * And the doctor looked at his ankle and twisted it around and said, it is slightly swollen and he examined it very carefully and wiggled it all around. * * * The doctor asked him to stay around a day or two until the swelling went down and he said, 'No, it isn't necessary; it don't amount to anything,' and he wouldn't stay." (Tr. 51-52.)

According to the claim agent, Foley, the sprained ankle was all that he dealt with in concluding the settlement. When he says that Burton brought Reid from Dr. Longeway's office:

> "I asked him, 'Did the doctor look you over?' He said, 'Yes, sir.' I said, 'What did he tell you?' 'He said my ankle was sprained a little.' * * * " (Tr. 59.)

Appellee testified that the claim agent said:

> " 'You better take ten dollars for to get some

liniment,' and something like that, 'ten dollars to get some liniment to rub on my feet.'" (Tr. 29.)

While each of the claim agents deny the talk about liniment for feet, they are at variance with each other in their versions. Burton says that Foley asked him if he thought ten dollars would be all right, and that Reid said that would be fine. (Tr. 54.) Foley says he asked Reid how much he wanted in the line of settlement, and that Reid said, "Well, how will ten dollars do?" (Tr. 60.) Foley says Burton was wrong in his account of what occurred as to the mention of money. (Tr. 61.) Since the claim agents fell out with each other as to what occurred, it appears that the recital of Reid as to the talk about liniment for feet ought to be regarded as entitled to credence.

As to what Dr. Longeway considered in his part of the settlement transaction, the appellee testified that he was met at the depot in Great Falls by two men who took him to the doctor's office in an automobile; that the doctor examined him, told him he was badly shaken up, and said, "You will be all right to work tomorrow, if necessary." The doctor just examined his foot; that was all. (Tr. 28.)

APPELLEE'S AUTHORITIES.

We will leave for the present the discussion of appellant's second interrogatory at page 18 of the brief until later, and dispose of the third query propounded at page 19, which is whether a release executed in the manner and form as that herein consti-

tutes, by its terms, a bar to any action on account of personal injuries. In answering that question, which is determinative on this appeal this appellee relies for sustaining the judgment and decree herein upon three cases. These are:

Lumley v. Wabash R. Co., 76 Fed. 66;
G. N. Ry. v. Fowler, 136 Fed. 118;
Tatman v. Fidelity B. & W. R. Co. (Md.), 85 Atl. 716.

In the Tatman case the authorities upon the question at issue are thoroughly reviewed, and in that case a release as general in its terms and as comprehensive in its scope as the one in the case at bar, was involved, and the Railway Company was restrained from pleading the release in the law action wherein the plaintiff was seeking to recover damages on account of injuries sustained while a passenger by the explosion of powder in transportation over the company's railroad. The plaintiff at the time of her injury was a minor, named Blema B. Jones. She subsequently was married, and as plaintiff, sued as Blema B. Tatman. Her mother also was injured by the same explosion. A joint release was executed by Blema B. Jones, her father and mother and the guardian appointed for the child; the sum of $3400 was paid for the release for injuries to Blema B. Jones and her mother without stating in the release the character of the injuries or distributing or separating among those entitled thereto the sum paid for the injuries to the two persons. It was agreed,

however, that the sum of $500 was for injuries to Blema B. Jones, and this part of the $3400 was received by her guardian. Beyond slight injuries, the injury received by Blema B. Jones was to one of her eyes. She was attended by the physician usually employed by the family and by another physician, an eye specialist of repute, both of whom were employed by the Railroad Company, and by it paid for their services. These physicians told the injured girl, her parents and one Dorrance, an agent of the company engaged in settling claims of those injured by the explosion, that the injury to the girl's eye was only a scratch on the surface of the eye, and one of them said that glasses would bring the eye right. Relying on these representations, the parents of Blema B. Jones agreed with Dorrance upon a settlement for the injuries sustained by the child and her mother. The release was in the following language:

> "All claims and demands which we or any of us have or can have, against the said the Philadeplhia, Baltimore & Washington Railroad Company, or their successors, for or by reason of any matter, cause, or thing whatsoever, and more especially by reason of losses and damages sustained by us in consequence of personal injuries received by the said Addie M. Jones, wife of the said Alexander Jones, and injuries received by the said Blema B. Jones, minor daughter of the said Alexander Jones and Addie M. Jones, which were caused by the explosion of glycerine powder in a car of a train at Greenwood, in the state of Delaware, on December 2, 1903. And the said the Philadelphia, Baltimore & Washington Railroad Company, in paying the said sum of

> money, do so in compromise of the said claim and demand above released, not admitting any liability on account of the same."

Afterwards the injury to the eye of Blema B. Jones was found to be different from that which all concerned considered to exist at the time of the release. She lost the sight of the injured eye, and another specialist found that the eye, instead of being superficially scratched, had been penetrated deeply through four coats, including the retina, and the eye was removed. The court said:

> "By the pleadings and proofs, then, it appears that a release was given for personal injuries, all the parties to the release, both releasors and releasee, believing that the injuries were of a certain kind, while in fact they were not only more serious in extent, but different in kind, for it is fair to say that a superficial scratch of the cornea of the eye is quite a different kind of an injury from a deep penetration through four coats of the eye, including the retina. Again it appears clearly proven that all parties relied on the physicians of the company and their representations without independent advice, and that the statements were made and treated as the basis of the settlement which was induced thereby. It is also true that there is no evidence of bad faith on the part of the medical attendants, but of a mistake in diagnosis. Under such circumstances no fault is attributable to the complainant, or those acting for her, in accepting the settlement and giving the release, under the circumstances here alluded to, or under any shown in the evidence."

In its review of the cases the Maryland court cites all of the cases comprised in the endless chain of au-

thorities presented by appellant and many others, which it distinguishes, and bases its decision upon the *Fowler* and *Lumley* cases. We set out the Maryland court's treatment of those cases fully for the reason that we feel it could not be done better than in that opinion:

> "A case in point is that of Great Northern Ry. Co. v. Fowler, supra. There the complainant, a brakeman on the railroad, after being injured went with a claim agent of the company to the physician of the company, who found a scalp wound and a contusion of the shoulder and nothing more, but told the injured man that he was practically well and would be able to go to work in a week or two. Without other advice the complainant settled for an amount equal to wages he would lose, and bills for doctors and nurses. A release was given, which apparently was general in form, without specifying the injuries. Later it developed that the injuries were serious, the disability permanent and a dangerous surgical operation was performed. The Circuit Court of Appeals affirmed the decision of the Circuit Court annulling the settlement and release. The appellate court found that there was a mutual mistake as to the nature and extent of the injuries and that the settlement was induced by the advice of the surgeon of the releasee without other advice, and, therefore, that the release should be set aside. The court distinguished the case before it from one where there was no misrepresentation on the part of the releasee and the releasor simply relied on the opinion expressed by the physician of the releasee employed to examine and report on the injuries. Such a case was Nelson v. Minneapolis, etc., Co., 61 Minn. 168, 63 N. W. 486. Judge Gilbert thus distinguished:

'But it is equally true that a mutual mistake of fact or an innocent misrepresentation of the facts of the releasor's injury, made by the releasee's physician, may be effective to avoid a release induced thereby.'"

"In the case of Lumley v. Wabash R. Co., 76 Fed. 66, 70; 22 C. C. A. 60, 64, the injured person was examined by the physician of the company which had caused the injury. It was supposed that the only injury was a broken arm, and when complaints were made of shoulder pains no examination of that part was made by the surgeon, who told the injured man that it was due to the broken arm and they were sympathetic pains. Based on these facts a release was given. Later a broken shoulder was discovered. The release was set aside. Judge Lurton in giving the opinion, said there were two grounds of relief, and thus stated the first:

'If the existence of this injury was known or suspected by the surgeon of the defendant, it was his duty, under the facts stated in this bill, to have informed Lumley of the trouble. To say to him that the pain of which he complained was sympathetic, and was caused by the fracture below his elbow, was a positive misrepresentation of the truth, and an operative fraud. To say that Lumley ought not to have trusted or relied upon his opinions or representations, knowing that he was in the service of the company, against whom he had a claim, is no answer. On the facts stated he knew that a release was being bargained for upon the basis of his opinion as to the extent and character of the injuries complainant had received, and the probable time he would lose from his occupation by reason thereof. He was under strong obligation to give his honest opinion upon a matter of professional knowledge, upon which he had every reason to know this ignorant man was implicitly relying.'"

Of the case of *Houston & Texas R. R. Co. v. McCarty,* 60 S. W., 429 (53 L. R. A., 507), cited by appellant, and which is also cited by this court in the Fowler case, the court said of that case as decided in the court of Civic Appeals of Texas, and which is there entitled, *McCarthy v. Houston, etc. R. R. Co.* 54 S. W., 421, that it:

> "was a case where a passenger was injured, and while ill was advised by the physician and claim agent of the company. The only injuries seemed to be a broken ankle. The physician's attention was called to severe pains in the back and bowels of the injured person, but the physician told the injured man that they would be well in six weeks. Relying on this statement, the release, general in form, was for all injuries from the accident without stating any particulars as to what the injuries were. Soon serious trouble with the spine and bowels of the releasor developed. It was sought to annul the release as a bar to an action for damages. The Court of Civil Appeals held that, notwithstanding the form of the release, the misrepresentation of the physician of the company was sufficient to upset the settlement. On appeal the decision was reversed by the Supreme Court, because of the form of the release (see 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854.)"

The Maryland court said that it was significant that the reliance of the releasor on the statement of the physician of the company was not certified to the Supreme Court in the Statement of Facts, and so was not considered by that appellate court; that the decision of the court of Civil Appeals of Texas

was, therefore, entitled to be regarded as of more weight than that of the Supreme Court.

It will be observed that in the *Tatman* case the pleading of the release was enjoined on two grounds. The first was the fact that the injured persons relied on the statement of the physician of the Railroad Company, and the second was mutual mistake. Of the first the court said:

> "In the case before this court there was an entire reliance on the physicians of the railroad company in the negotiations for the settlement, and but for their statements as to the extent of the injury it is but fair to say that the settlement would not have been made. These statements as to the wound were untrue. An innocent misrepresentation made by the physician of the releasee, as to the kind of injury received by the releasor may be effective to avoid a release induced thereby."

And as to the second ground it said:

> "Notwithstanding the general terms of the release, the case before this court is not one where it was sought to compromise and settle a general claim for all injuries resulting from a particular accident, known and unknown, but only those known to exist, as reported by the defendant's physician, on whose reports all parties to the negotiations and release rightly relied. If the physicians honestly supposed that the eye was only scratched on the surface, and not penetrated deeply to the retina, either because their examinations had been superficial, or for other reasons, then the case is one where the release is comprehensive enough to cover a matter of claim unknown to both releasor and releasee, and, therefore, not considered in the settlement. From

such mistake, according to settled principles applicable to all mistakes of fact, instead of opinion, equity will relieve.

"On both grounds, either of which is sufficient, the court should relieve the complainant from the consequences of the release.

"It is undisputed in this case that the releasor and releasee depended on the statements of the physicians of the releasee as to the kind and extent of the injury; that the settlement was induced by these statements, made for that purpose; and that the statements were wrong. Under such circumstances, by all the cases which have been brought to the attention of, or examined by, this court, there exists such a clear mutual mistake as to existing facts, and not as to opinions, as should invalidate the release as a binding settlement, though the release be in form for all injuries received from the accident without specifying the injuries."

APPELLANT'S CLAIM OF ESTOPPEL.

Subdivision II of appellant's brief is devoted to its claim that by his conduct appellee is precluded from now making a claim for any other injury received by him in the accident. Appellant says that where a party by his conduct waives inquiry into a fact he cannot subsequently be heard to say that either he or the releasee were ignorant of such fact, in an attempt to set aside the release. No doubt the position of appellant as to the abstract proposition of law is correct, but the trouble is, no such case as fits it is presented here.

Appellant makes much of the alleged attempts on the part of Dr. Longeway and claim agent Burton

to induce the appellee to remove his coat to have his arm examined. Their statements of what occurred at that examination in the particular of the removal of the coat were mere conclusions. Each says Reid either would not take off his coat or refused to take it off, saying the injury to his arm or bruise on his arm and shoulder did not amount to anything, and he would be all right. The physician and claim agent seek by their testimony to make it appear that the appellee was a very hard customer to deal with; that they were greatly concerned in his welfare, and were endeavoring to find out everything that possibly could form the basis of a claim for injuries on the part of appellee.

This is the only incident, it seems, in the trial record where Reid appears to be disposed to make objections to anything. On page 51 of the record, Burton, the claim agent, says:

> "His general appearance seemed to be all right. He was very sociable, talked very freely, explained the accident, gave me the time and just what he was doing and talked a great deal all the way from the office to the doctor's office, and he also talked at the time the doctor was taking care of his foot."

Nowhere do we find Reid objecting to anything that was suggested to him until his refusal to take off his coat. Appellant now contends that this refusal to take off his coat was a waiver of any claim of injury which he might have suffered in the accident. How the doctor could discover that Reid had

suffered an injury which would result in hernia by taking off his coat, we are not advised by appellant. We think the court will take judicial notice of the fact that no such hernia as is claimed the appellee suffered in that accident could be discovered by the removal of the coat, vest and shirt. That would not amount to a waiver of a claim for that hernia any more than if the appellee had been requested to remove his hat and had refused to do so.

The case of Kawalke v. Milwaukee Ry. Co., 79 N. W., 762, cited by appellant in this connection, and which counsel say is well considered, is not at all in point. In that case the very nature of the situation out of which the subsequent claim of injury arose was the subject of discussion. The plaintiff in that case claimed and insisted that she was not in the condition which the examing physician thought she was, and to ascertain which he insisted upon making an examination. She was equally certain that no such condition existed, and was so much so that she refused to have the examination performed. She certainly knew or ought to have known as much about as the doctor.

In the case at bar nothing about hernia was suggested or thought of by any of the parties concerned in the settlement. As to any injury which might have developed in Reid's arm or shoulder, or anywhere concealed by his coat after he had refused to remove it, and submit to an examination, it might well be said that he ought to be precluded from

making any claim for damages on such account on the principle of estoppel by waiver. It is certainly a fixed principle of law that one cannot be held to waive anything about which he knows nothing and concerning which there is neither claim nor dispute.

CONCLUSION.

A perusal of the entire record of the case as presented by appellant renders it apparent that the appellant was by its witnesses seeking to establish that appellee made his trip to Great Falls for the purpose of collecting damages for his injury. We have the testimony of Burton that the first time he ever saw Reid was when Reid came into the claim agents' office. (Tr. 49.) Burton says that he went down to the station in response to word from Geyser that a workman had been injured, and would be on train No. 237 which was due at Great Falls at 1:30. He said he looked around the station and could not find Reid, and went back to the claim agents' office. (Tr. 49.)

Appellee's witness, McElroy, who had known Reid prior to the accident, was at the station in Great Falls at the time of Reid's arrival. He says:

> "Why, I started to go up to speak to Mr. Reid and the old gentleman stepped between us. I wanted to ask him what the trouble was because I saw he was hurt, looked bad and his shoe was cut up there and he seemed in pain. I knew he had only been there somewhere about thirty days or a month and I recognized him and I wanted to see what the trouble was and

> the gentleman objected to my talking to him. He asked me who I was and I told him who I was. 'Oh,' he says, 'That is different,' he says, 'You can talk with him, but I thought you were a lawyer trying to get a case.' I says, 'No, I am not a lawyer.'" (Tr. 41.)

The old gentleman referred to by Mr. McElroy was none other than the claim agent. That claim agent was Burton, who took Reid to the doctor's and to his office. (Tr. 28.)

Appellant's counsel, at page 27 of the brief, say that Reid's claim that he was taken from the station to the doctor's office in an automobile is not substantiated even by McElroy. It is true that McElroy does not testify as to the automobile, but we submit that all of the probabilities are naturally resolved in favor of Reid's testimony. Certainly if the claim agent was there at the station for the purpose of taking an injured employee to the company's physician, it is most likely that he would be there with a conveyance of some sort.

Referring also to Reid's condition, appellant's counsel say, at page 27 of the brief, that he walked down the stairs from the claim agent's office a block and a half to Dr. Longeway's office, and up the stairs, then back down over to the depot and took the train back to Geyser the same day, the record nowhere bears out such statement. The fact is that Reid was endeavoring to make his escape from Dr. Longeway's office and get back to the station, and he would have accomplished his purpose but for the importunities of

Burton, the claim agent. Burton says as to this:

> "After leaving the doctor's office we left the building together and started down the street going from there to Central Avenue and then down Central Avenue." (St. 52.)
>
> "We walked around Central Avenue, walked down the street and then crossed over and went over to our office. When we got to the corner of Central Avenue and Second Street North—the depot is right down Central Avenue a block—we turned to the right and he started on down and I says, 'You better come up to the office now and see Mr. Foley before you go back.' So he says, 'All right,' and he came up to the office and we went into the office and went upstairs into the office and I turned him over to Mr. Foley." (Tr. 52-53.)

So it appears from appellant's own witness that Reid was not in Great Falls for the purpose of making a monetary adjustment of any injuries suffered by the accident. After his treatment by Dr. Longeway, he was endeavoring to get back to the station to take the train to Geyser and was about to start "on down" (to the station) when Burton suggested his going to see Mr. Foley. Burton was sticking about as close to Reid as Reid's own shadow, and there was no escape, it appears, for the appellee. He had to accede to Mr. Burton's proposal. Burton says:

> "My duty is to take care of the men and see that they get the proper treatment. If the man is in town, that is the time to make a settlement. After he gets out into the country, we have got to spend money to go after him." (Tr. 58.)

In his benevolent endeavors to see that the men get proper treatment, Mr. Burton, at the time Dr. Longeway examined Reid, was so zealous in his endeavors in the interest of appellee that he said to him:

> "Well, are you sure you haven't any other injuries?" (Tr. 51.)

It must be gathered from the testimony of each of the two claimants and of Dr. Longeway that they never would have permitted the appellee to settle for the sum of $10 had they entertained the slightest suspicion that he was injured in any other particular than that for which he was treated by the doctor, so that the decision of Judge Rudkin that a mutual mistake was made in effecting the settlement was, at all events, a charitable view of the situation. One might well conclude from the testimony of the claim agents in this case that they had taken a post-graduate course in their vocation among the "settlement workers" engaged in the social uplift among the poor and unfortunate in the great centers of population. It is very apparent that they hurried and hustled Reid through the process of settlement when he was not seeking any or looking for any money adjustment for his physical ails whatever.

This case we think is much stronger than either the *Fowler, Lumley* or the *Tatman* cases. In each of those, and particularly the *Fowler* and *Tatman* cases, the apparent injury was the subject of the settlement, and was discussed by the parties. In the *Fowler* acse what was thought to be a mere scalp

wound turned out to be a fracture of the skull. In the *Tatman* case what was thought by all parties concerned to be a mere scratch on the surface of the eye turned out to be a wound that penetrated the retina and subsequently caused the loss of the eye. Those cases, it might be argued, involve injuries which were considered by but which proved to be more severe than the parties thought, and that, therefore, their suppositions and speculations were included in and formed a part of the consideration for the release. Notwithstanding that argument it was held that the injuries thought to have been sustained and what really were suffered were different in kind and not merely in degree, and that settlement on the basis of what they were supposed to be was based upon a mutual mistake of fact.

In this case the injury from which developed the hernia on the left side was not felt by appellee nor thought of nor discussed by the physician or the claim agents. All parties to the settlement were wholly and totally oblivious as to any injury of that nature, and its existence was not known to the appellee himself until the following day when his attention was called to it by the pain in that region. In two of the cases cited, the injured one or the releasor, was a person of intelligence and education. In this case we have one of whom the court said:

> "Nevertheless the condition of the plaintiff is a pitiable one. He is illiterate and far below the average in intelligence, and if he has sustained injuries not embraced in the compromise set forth

> in the complaint he should have his day in court and an opportunity to establish his rights before a jury. I am therefore of opinion that the release is no bar to an action by the plaintiff for any damages sustained by him aside from the injury to his foot which was clearly within the contemplation of the parties when the settlement was made." (Tr. 105.)

Appellee clearly made out a case where it is plain that the release herein would operate as a fraud if appellant was suffered to rely upon it as the impediment of recovery to that part of appellee's damage not discussed or considered and not intended to be released. The decision of the Honorable District Court was right and should be upheld.

Respectfully submitted,

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